CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT

SHREVEPORT,

IN

OCTOBER, 1884.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ,* *Chief Justice.*

Hon. FÉLIX P. POCHÉ,
Hon. ROBERT B. TODD,
Hon. THOMAS C. MANNING,
Hon. CHARLES E. FENNER,
} *Associate Justices.*

No. 132.

THE STATE OF LOUISIANA VS. JAMES BIRDWELL.

In a criminal prosecution a juror is not incompetent because it is shown that on the day before the trial he declared in a public store that he intended to convict every person tried before him as a juror, and when it is shown that on his *voir dire* the juror showed that he had no bias or prejudice in the case. Courts will not consider gossip in determining the legal qualifications of jurors.

A juror who acknowledges to have formed an opinion in the cause, but asserts that such an opinion will readily yield to the evidence on the trial, and that he feels able to do impartial justice in the case, is competent. State vs. Dugay, 35 Ann. 327; and other decisions affirmed.

Evidence to show that the accused had made efforts to cause the deceased to leave the country, in reference to a criminal prosecution instituted against him by the latter, who is the material witness in such case, and that in that connection he had made threats

*Absent during the whole of this term.

against the deceased, is admissible, as it tends to show elements of malice in the homicide.

Evidence of the dangerous character of the deceased and of threats made by him against accused, unless preceded or accompanied by evidence of an assault or overt act, or of some hostile demonstration, at the time of the killing, is inadmissible as a defense against the charge of murder. The law of self-defense expounded.

APPEAL from the Eleventh District Court, Parish of Sabine. *Pierson*, J.

D. C. Scarborough, District Attorney, for the State, Appellee.

J. F. Smith, T. C. Armstrong and *Wm. Goss* for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Appealing from a sentence to the Penitentiary for life, on a charge of murder, the defendant complains, by bills of exception, as follows:

1. That the judge erred in accepting as competent a juror who had on the previous day declared in a public store that he "intended to convict every person tried before him as a juror." The bill shows that on his *voir dire* the juror stated that he had made the remark imputed to him in a jocular manner; that he had no opinion or bias either way in the case on trial; and his examination convinced the judge, as it satisfies us, that he was a competent juror. We can but commend the course of the judge in disregarding an imprudent or light remark made by a juror out of the presence of the court.

Corner grocery gossip cannot be considered as an element in the consideration of a serious question touching the legal qualification of a juror in a trial involving the life or liberty of a human being.

2. He charges error in the ruling of the judge on the qualification of a juror who stated on his *voir dire*, in substance, that from conversations which he had had with several persons, not known to him as witnesses in the case, he had formed an opinion, which would only yield to different evidence.

During a further examination the juror stated that he had no bias or prejudice for or against the accused, whom he did not know; and that the opinion which he had formed, and which rested on rumor, would readily yield to evidence on trial. Whereupon the judge promptly and correctly ruled that he was a competent juror, and overruled the objection of defendant's counsel to his competency.

The serious manner with which counsel for the accused press their objection before this Court satisfies us that our recent decision in the

case of the State vs. Dugay, 35 Ann. 327, has thus far escaped their attention. In that case we reiterated the well established rule which recognizes as competent a juror who states that he has formed an opinion in the case, but who asserts at the same time that he is free of bias or prejudice, and that he feels able to do impartial justice according to the law and the evidence in the case.

As we said in the Dugay case: "We now distinctly and emphatically reiterate that this is the correct rule, with the reasonable hope that it will be clearly understood by the profession."

3. He next charges that the judge erred in admitting, over his objection, the testimony of a witness intended to show that some three weeks previous to the homicide the accused had solicited the witness to induce the deceased "to leave the country." The bill shows that this request was made with reference to a criminal prosecution which the deceased had instituted against the accused, and in which he was the material witness. It further appears that the accused had made threats against the deceased in connection with that prosecution. Under that state of the case the evidence was admissible. Malice being of the essence of murder, it was competent for the State to prove a feeling of ill-will and enmity on the part of the accused to the deceased, as both are elements of malice.

The evidence, although not immediately connected with or making part of the *res gestae*, was not irrelevant, as charged by counsel, because it served to enlighten the minds of the jurors on some of the motives which impelled the perpetration of the homicide, and because it tended to show premeditation, one of the essential elements of murder.

4. The defendant complains of the rejection of evidence offered by him to show the general dangerous character of the deceased, and to prove threats previously and repeatedly made by him against the life of the accused. The evidence was excluded on the ground that the accused had not yet shown any overt act, assault or hostile demonstration by the deceased against the accused at, or immediately before, the time of the killing.

It appears from the bill that from the evidence previously introduced and uncontradicted, it had been shown that the deceased had been killed at a steam mill where he was employed, and to which the accused had gone in the evening in company with another person, and that he was shot when in the act of leaving for his home with a bag of meal on his shoulders and when he was walking away from the ac-

cused, with whom he had just exchanged a few words in answer to the inquiry by the accused whether deceased had or not threatened to kill him.

To his inquiry the deceased made answer by asking him, "Who told you so?" To which the defendant had answered in a violent manner that it made no difference. Whereupon the deceased replied, "Let me alone, I don't want any fuss with you;" and walked away when he was shot, and in his flight, before falling, was pursued by the accused.

We have taken the trouble to thus detail these circumstances, because they conclusively show a state of things entirely inconsistent with the circumstances, which could alone justify the introduction of the evidence of the dangerous or violent character of the deceased, and of previous threats alleged to have been made by him against the life of the accused.

It must be noted that the evidence was offered as a defense to the charge of murder, without restriction or qualification, of intending the same to rebut the evidence in proof of malice previously introduced by the State. That feature of the question entirely removes it from the effect of the rulings and *dicta* in the cases or the State vs. McNeely, 34 Ann. 1022, and the State vs. Cooper, 32 Ann. 1085, relied upon by counsel. Under the authority of those cases the evidence might have been admissible if offered with the avowed and exclusive object and purpose to rebut the proof of malice or to mitigate the offense charged. But in the absence of such a restriction, and when offered, as in this case, as a general defense to the charge of murder, and in the absence of any proof to show an assault, an overt act or a hostile demonstration as the immediate occasion of the homicide, that evidence has uniformly been held to be inadmissible.

The rule of its exclusion rests on the wise and philosophical reason that no one is justifiable in killing a man simply because he is vicious, quarrelsome or dangerous, or because he has made threats which he manifests no intention of carrying into effect. Wharton's American Criminal Law, sec. 641; State vs. Jackson, 33 Ann. 1087; State vs. Vines, 34 Ann. 1074.

5. The last bill embodies a complaint against the refusal of the judge to give the following special charge to the jury:

"What constitutes such an overt act as will warrant a person in slaying his enemy in his own defense, is a question for the jury, to be resolved according to the circumstances of each particular case; no general rule can be laid down upon the subject."

In lieu of which the judge gave the following charge:

"That the law requires such an overt act on the part of the deceased at the time as would be calculated to produce in the mind of the prisoner a reasonable apprehension that the design was to take his life or to do him great bodily harm. To excuse homicide in self-defense, the assault must be perilous, not any act, not even such as the jury ought to excuse, but dangerous action, imminent peril, necessity can alone excuse."

It takes but a glance at the two propositions as quoted to satisfy the legal mind that the judge's refusal to give the charge suggested by counsel was eminently proper, and that the charge which he gave contains the true and correct doctrine of self-defense as expounded by nearly all American courts, and as announced by all respectable authors on criminal law.

This concludes the consideration of all the objections and contentions suggested by the zeal and ingenuity of counsel in their laudable efforts to extricate their client from the clutches of the law, and we have found no error to his prejudice, or no reason to relieve him from the penalty of his own act.

Judgment affirmed.

No. 138.

THE STATE OF LOUISIANA VS. FERDINAND EDWARDS.

Where an appeal is taken by a person convicted of a crime and under sentence, who escapes from custody during the pendency of his appeal, and who remains a fugitive, his appeal will be dismissed.

APPEAL from the Second District Court, Parish of Bossier. *Drew*, J.

J. A. W. Loughery, District Attorney, for the State, Appellee.

J. A. Snider for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant was convicted of murder and sentenced to a life imprisonment in the penitentiary. He appealed to this court and during the pendency of the appeal escaped from the jail in which he was confined. He was not re-arrested and is now a fugitive.

The district attorney moves to dismiss the appeal by reason of the above facts. The motion must prevail. A prisoner, under conviction

and sentence, who has escaped from custody during the pendency of his appeal, cannot, by counsel, prosecute his appeal.

In the case of State vs. Wright, 32 Ann. 1017, while the fact of the escape was not fully established, on motion of the district attorney to continue the case, we granted the continuance. In this case there is no doubt of the escape and there is no reason whatever why the case should remain any longer on the docket.

The appeal is therefore dismissed.

No. 134.

THE STATE OF LOUISIANA VS. FRANK WILSON.

A voluntary confession of the accused, not made under restraint or constraint, is admissible in evidence. If it is admitted by his consent, he cannot afterwards object to it.

Objections to the form of the oath administered to the jurors must be made at the time of their qualification. Such objections are assimilated to those made to the possession by a juror of the proper qualifications, which must be made when he is offered, and to those that may be made to the list of jurors, which must be complained of when the imperfection or defect is discovered. It is too late to object to the form of the oath in a motion for a new trial.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

M. S. Crain, District Attorney, for the State, Appellee.

John W. Jones for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. From a sentence to hard labour for eight years, inflicted upon a conviction of burglary and larceny, the defendant appeals, and relies for reversal upon a bill of exception and a motion for a new trial.

The bill is to the admission in evidence of a confession of the defendant under these circumstances;—Two men, one the owner of the house broken into, were in pursuit of the felon, and coming up with the defendant asked if he was the man that came down the road that morning, and if he was armed. They ordered him to lay his pistols down, which being done, they asked him where were the things stolen. One of the parties had a gun in hand, apparently ready to use it. The confession then made was ruled out.

But on the following day all of them, the pursuers and pursued, seem to have fraternised. While laughing and talking over the event, the defendant said that he was a fool for telling where the gun was (a gun

was one of the things stolen) for he had hid it so well they would never have found it, and if he had known the owner of it was as poor as he was, he would not have entered his house and taken his things; he thought it was a negro's house and actually smelt the pants, (which he had also stolen), to test the colour of the wearer by the odour.

This conversation was admitted. That it was voluntary and not made under restraint or constraint is apparent. But its admission was preceded by the inquiry, addressed by the court to the prisoner's counsel, if he had any objection to urge, which was responded to negatively. The confession was therefore admitted by the prisoner's consent, and no objection to it can now be heard.

The motion for a new trial is based on the alleged insufficiency of the oath administered to the jurors.

Even if the oath were defective in form, advantage cannot be taken of it in a motion for a new trial. Objection should have been made at the time it was administered. It seemed to have been good enough in the opinion of the prisoner for the purpose of an acquittal, and he cannot take the chances of a favourable verdict, withhold objections that should have been made on the instant, and remit the disclosure of them to the close of the trial.

Objections to the form of the oath are assimilated to objections to the qualifications of jurors which must be made when they are offered, State v. Bower, 26 Ann. 383, and to objections to the list of jurors, the incorrectness of which cannot be taken advantage of, if no complaint is made at the moment of discovery. State v. Shay, 30 Ann. 114.

Judgment affirmed.

No. 136.

The State of Louisiana vs. Ben Jenkins et al.

Where, on appellant's own motion and suggestion, an appeal is made returnable at a time and place different from those required by the provisions of a mandatory law, and where the order of the judge granting the appeal shows that he merely adopted the suggestion of appellant by granting the appeal "as prayed for," the error is imputable to the fault of appellant, and, under the settled jurisprudence of the State, the appeal must be dismissed.

The constitutional right of appeal is a right of appeal in conformity with law.

Rules of practice, when once settled by authoritative decisions, must, in public and private interest, be adhered to.

APPEAL from the Tenth District Court, Parish of De Soto. *Logan*, J.

J. C. Pugh, District Attorney, *W. H. Wise* and *J. H. Shepherd*, for the State, Appellee.

W. H. Jack, *John L. Seales*, *C. M. Pegues*, *T. F. Bell* and *C. B. Stewart* for Defendant and Appellant.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

FENNER, J. The ground of this motion is, that the appeal taken on February 28, 1884, was made returnable to this point, instead of to New Orleans where this Court was then in session and remained in session until may 31, following.

The return day fixed was in gross violation of the provisions of Act 30 of 1878, which requires appeals in criminal cases to be "made returnable within ten days after granting the order of appeal, whenever the Supreme Court may be in session on the return day."

This error is unquestionably fatal to the appeal, unless saved by the provisions of Act 53 of 1839, now section 36 of the Revised Statutes, which provides, in substance, that such error shall not occasion the dismissal of the appeal unless imputable to the fault of appellant.

The question in this case is whether or not the error here was imputable to appellant's fault.

What are the facts?

The record shows that on February 28, a written motion of appeal was filed, signed by the numerous counsel for appellant, in which they, in the language of the document, "moved the court for an appeal returnable to the Supreme Court of Louisiana, at Shreveport, La., on the second Monday of October, 1884."

On the same date the order of appeal was entered on the minutes in the following words: "Motion for an appeal filed and returnable to the Supreme Court at Shreveport secnd Monday of October next and according to law, and *it is ordered that appeal be granted as prayed for in the motion.*"

Observe: appellant filed a motion asking an appeal returnable at Shreveport; the court simply granted the appeal "as prayed for in the motion."

Now, whatever contrariety of opinion may have existed previously, it has been settled since the case of Wooton vs. LeBlanc, 32 Ann. 692, that when the appellant expressly asked that the appeal be made returnable at a wrong time and place, and the order of the judge merely fixed the return day as prayed for, the error is imputable to appellant's fault and the appeal should be dismissed.

In a very recent case, we repeated the doctrine very emphatically, saying: "it is elementary in our practice, that when an improper return day is suggested by appellant, the error is attributable to his own fault and his appeal cannot be maintained." State *ex rel.* Lee vs. Jumel, 35 Ann. 980.

In Delwood's case we admitted an exception to the general rule. There, although the appellant suggested the erroneous return day, in his motion, yet the order of appeal recited that "*by reason of the law* and of the motion herein filed, the appeal is granted returnable, etc." We held that inasmuch as the order showed by its terms that the judge acted "by reason of the law" and not merely in pursuance of appellant's suggestion, the order was an exercise of judicial discretion, error in which could not prejudice appellant. But we distinctly differenced the case from that of Wooton vs. LeBlanc, whose authority was not impugned. State vs. Delwood, 33 Ann. 1229.

This decision does not protect the present case where the peculiar feature on which it rested is entirely wanting.

Indeed, it is not with very good grace that appellant invokes the shelter of Delwood's case, because in that very decision we pointed out the gross illegality of the return day fixed, and it must have been known that the order asked for by him was equally illegal.

He asked for an order so patently illegal that even ignorance or doubt of its illegality could not be pretended. The judge granted it. There is nothing to show that the judge exercised any independent discretion or did anything more than grant the appellant's own prayer by allowing the appeal "as prayed for."

With all our desire to protect the right of appeal, especially in criminal cases, we cannot avoid the conclusion that the error here is attributable to the clear fault of appellant, and that it is fatal to his appeal.

The constitutional right of appeal is a right to an appeal in conformity to law.

Rules of practice, when once settled by authoritative decisions, must be adhered to. They cannot be varied, without involving in uncertainty questions about which public and private interests require that there should be no uncertainty. In no class of cases, does the rule of *stare decisis* apply more forcibly.

It is, therefore, ordered, adjudged and decreed that appeal herein taken be dismissed.

No. 137.

MARGARET VIOLA GRAY vs. SIMEON GRAY.

In an action for partition of property held in indivision, the jurisdiction of this Court must be tested under the same rules which govern in succession matters. The jurisdiction of this Court depends upon the amount of the fund to be distributed, and not upon the amount claimed therein.

In this case the amount of the inventory is less than $2000; and the fact that appellant claims $5000 against the community, cannot vest jurisdiction in the Supreme Court.

APPEAL from the Second District Court, Parish of Webster. *Drew*, J.

J. D. & J. T. Watkins for Plaintiff and Appellee.

J. E. Reynolds for Defendant and Appellant.

MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. The object of plaintiff in these proceedings is to obtain a partition by sale of the property depending upon the succession of her mother in community with the defendant, the surviving husband, and to obtain a recognition of her mortgage rights on the immovable property of the community, in restitution of her mothers paraphernal funds, amounting to $1502 54.

The defense is a general denial, followed by a plea in reconvention for judgment in the sum of $5000, the alleged amount of the defendant's separate funds used and disbursed for the benefit of the community. He has taken this appeal from a judgment in favor of his daughter, allowing her all the relief which she sought.

The motion to dismiss, predicated on our want of jurisdiction *ratione materiæ*, must prevail, because the fund to be distributed, as shown by the record, does not exceed, but is less than, two thousand dollars. From an inventory taken of all the property belonging to the succession and to the community, it appears that the pecuniary value of the same is $1918 72; that is the fund to be distributed, and that affords the test of our jurisdiction, irrespective of the amount claimed therein. Art. 81, Constitution.

Hence it follows that the amount claimed by the defendant as a credit against the community cannot be considered as a constituent element in the test of jurisdiction.

The object of the suit being for a partition of the community, and for the enforcement of a privileged claim thereto, the proceeding is

practically a settlement of the succession of plaintiff's mother; and the question submitted under the present motion must therefore be settled under the rules governing such cases.

Jurisprudence has long since settled the rule that in such cases the jurisdiction of this Court depends upon the amount of the fund to be distributed. Out of numerous decisions we quote the following as directly in point: Succession of W. H. Gale, 21 Ann. 487; State *ex rel* Hickman vs. Judge, 28 Ann. 935; Succession of James Cloney, 29 Ann. 326. It will be noted that these decisions were rendered under the Constitution of 1868, which did not circumscribe or define the jurisdiction of this Court in as narrow and clearly described limits as is done in the present Constitution, which has left very little room for discussion on the question of jurisdiction in all matters of partition and succession. But that provision, although clear and unambiguous, has been tested and has been judicially interpreted since the adoption of the present Constitution, and the rule is now absolutely settled that "the amount of the claim preferred against the succession is not the test of jurisdiction, but the fund to be distributed." Succession of Thomas, 35 Ann. 19; Succession of Andres, 34 Ann. 1063; Succession of Lesassier, 34 Ann. 1066.

It is therefore ordered that this appeal be hence dismissed at appellant's costs.

Appeal dismissed.

ON APPLICATION FOR REHEARING.

MANNING, J. The appellant calls our attention for the first time to the date when his appeal was taken, viz May 9th of this year, at which time the constitutional amendments changing the jurisdiction of this Court had not been promulgated, and therefore his appeal was rightly taken then. Those amendments became a part of the Constitution on May 15, 1884, and our disposition of the case should have been a transfer of it to the Circuit Court. We grant the rehearing solely for the purpose of altering our decree.

ON REHEARING.

It is ordered and adjudged that our decree dismissing the appeal in this case be rescinded and vacated, and that the record be transferred to the Court of Appeals for the Circuit that includes Webster Parish.

No. 141.

W. L. Dickson vs. Lizzie Dickson et. al.

Where in an act of mortgage the property mortgaged is first described by legal sub-divisions and these sub-divisions are then declared to compose a certain plantation, giving the name thereof and otherwise sufficiently describing it apart from the sub-divisions mentioned, *held* that the mortgage rested on the plantation and that parol evidence was admissible to show that the description by the legal sub-divisions was erroneous and that said numbers did not, in whole or in part, compose the plantation.

APPEAL from the Second District Court, Parish of Bossier. *Drew*, J.

J. D. & J. T. Watkins for Plaintiff and Appellee.

R. J. Looney, J. H. Shepherd and *Loughery & Vance* for Defendants and Appellants.

The opinion of the Court was delivered by

Todd, J. A judicial partition having been made of the lands belonging to the succession of Hannah P. Dickson, Mrs. Mattie L. Dickson, subsequently to said partition, obtained a judgment recognizing and rendering executory a special mortgage against a part of the lands so partitioned.

This judgment rendered necessary certain supplementary proceedings relating to said partition, having in view the readjustment of the shares of the heirs of said deceased, on account of this mortgage, and to provide for its payment by the heirs, who bought the lands at the partition sale.

In these proceedings Mrs. Mattie L. Dickson, the mortgage creditor of Hannah P. Dickson, deceased, intervened for the purpose of enforcing her mortgage against the property subject thereto. In her petition she alleged that her mortgage rested upon the Rush Point plantation and that she was entitled to the proceeds of the same in the proportion of the mortgager's interest therein. She further alleged that in the act of mortgage certain lands were erroneously inserted and described by numbers or legal sub-divisions as composing Rush Point plantation which, in fact, formed no part of the said plantation, the property really mortgaged.

The opposing parties asserted that the description of the lands in the act of mortgage was correct and conclusive, and denied her right to alter the description or to introduce parol testimony to contradict, change or modify the same as shown by the act of mortgage.

This contention presents the main issue in the case for determination.

The property mortgaged is thus described in the act:

"All her right, title and interest to the following described property, to-wit:

"Fractional section three, the east half and the northwest quarter of the northeast quarter, and the west half and northeast quarter, and west half and northeast quarter of northeast quarter of section four, and northeast quarter and southwest quarter of section five; and the northwest quarter of northwest quarter of section eight, township twenty and range fourteen.

"Said property being the Rush Point plantation on which Michael A. Dickson, deceased, formerly resided, and now occupied by Mrs. Mattie L. Dickson, containing about six hundred and sixty acres, more or less, together with all the buildings and improvements thereon, lying on Red river nearly opposite Carolina Bluffs."

From a reading of the above description it seems to us that it was clearly the meaning and intention of the contracting parties that the property to be mortgaged was the Rush Point plantation. This is the necessary inference from the words "the said property being the Rush Point plantation," etc.

If the language of the act makes it clear that it was the Rush Point plantation that was mortgaged, then the numbers or the legal subdivisions named in the act became secondary or merely descriptive of the subject of the contract—the thing mortgaged. It would be a bold proposition for either party to the contract to assert that the Rush Point plantation was not the subject of the mortgage, and one which would not be listened to, but to say that the numbers cited as composing the plantation did not, in fact, compose it, would not be strange, but be viewed as a misdescription of the property which, as well known, is of frequent occurrence in contracts of this kind.

The right which the creditor had was to enforce the mortgage on the Rush Point plantation, if that property was sufficiently described, and the right could not be defeated or affected by any errors in the description, whether in the numbers or otherwise, provided, that the description, taken as a whole, was sufficient to identify the property.

It seems to us clear, therefore, that there was nothing in the language of the act of mortgage, relating to the property mortgaged, that would prevent the intervenor, under the allegations of her petition from showing this misdescription of the property, and it was competent to do so by parol testimony. In like cases this right has never been denied. We cannot see anything in this case, on this point, to distinguish it from

the case of Levy vs. Ward, 33 Ann. 1033, where the authorities on this subject were all reviewed.

It was urged in argument by the defendant's counsel that that case was one instituted to correct an error alleged in the description of land sold and that this case differs from that one because there is no allegation of error. In this the counsel are mistaken, as we find in the petition of the intervenor a distinct allegation of an erroneous description of the property mortgaged—as we have before stated.

If the object of the parties was to effect a mortgage on the Rush Point plantation and that property was sufficiently described apart from the numbers—which we deem it to have been done under ample authority—the errors in the numbers could not defeat the true intent and purpose of the contract, and it follows as one of the plainest legal propositions that parol evidence was admissible to show the error.

If it be conceded that the real and true subject of the mortgage was the Rush Point plantation, and it was sufficiently described by metes and bounds or otherwise, and incorrectly described by numbers or legal sub-divisions, then it might be considered as presenting an ambiguity on the face of the act, which, without any allegation of fraud or error, might be explained by parol.

The evidence admitted shows what the Rush Point plantation embraced at the date of the mortgage; that some of the sub-divisions mentioned were not owned, at the time, by Mrs. Hannah P. Dickson, and some were separated from the plantation by an intervening proprietor, whose land was also included in the mortgage and which the mortgagor never claimed, which facts are strongly confirmatory of the mistakes made in the preparation of the act of mortgage.

It seems that a small part of hill land on the opposite side of Red river from the plantation in question, of little value, was purchased subsequent to the opening or establishment of the plantation. This tract was sold at the partition sale with the plantation, and as it could not be considered as forming a part of the plantation and subject to the mortgage, parol evidence was admitted to show the value of this land with a view to deduct its value from the total price at which the whole property—that is the plantation and the hill tract—was adjudicated, so as to ascertain the precise fund derived from the sale of mortgaged property. We think this evidence was properly admitted under the circumstances. We cannot well see how the object in view could have been reached without such testimony unless resort was had to other proceeeings. And it is evidently the interest of all parties that this matter, involving but a small interest, should be thus settled.

From a complete and thorough review of the record we think the judge of the lower court reached a proper conclusion upon the facts of the law involved in the issues presented, and thus did justice between the parties, and the judgment appealed from is, therefore, affirmed, with costs.

No. 133.

THE STATE OF LOUISIANA VS. JULIUS ROBINSON.

Non-arraignment, that would have been fatal to the legality of the verdict and sentence, does not exist where, after discovery that the defendant had not been arraigned, he waives arraignment and the trial begins *de novo*, and the jury are re-sworn.

Objection to the form of the jurors' oath must be made when it is administered, and cannot be made the basis of a motion for a new trial.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

M. S. Crain, District Attorney, for the State, Appellee.

Alexander & Blanchard for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The defendant was convicted of obtaining money under false pretences, and was sentenced to hard labor for one year.

A bill of exception was taken to an alleged want of arraignment. It appears the preliminary stages of the trial had been gone through—the jury had been completed after challenges by both sides, and the indictment had been read to them—in other words, the State had opened its case—when it was discovered that the prisoner had not been arraigned. The judge at once arrested the proceedings and ordered the arraignment of the accused, whereupon his counsel waived it but waived nothing else, by which we understand them to mean that they were to be considered at liberty to take advantage of the previous non-arraignment. This being done, the judge began *de novo*, the jurors were sworn again, but the indictment was not read again, and the trial proceeded.

We shall treat the waiver as the counsel seem to wish, leaving the defendant at full liberty to object to its previous admission. But what has he to complain of? The want of arraignment, which would have been fatal to the regularity of the trial, no longer existed. A plea was entered. The judge even took the precaution to have the jurors re-sworn. They had already heard the indictment read. It was not

needful, nay it would have been superfluous, to have read it again. The waiver took the place of an actual arraignment, and even if it did not operate as an estoppel, 1 Bish. Cr. Prac. § 117, the irregularity was cured, or regularity was restored by the judge commencing *de novo*, and going over anew what had already been done.

Adhering to the strictest technicalities would not justify interference with a verdict thus rendered.

The only other objection is presented in a motion for a new trial, of which the sole ground is an alleged insufficiency of the oath administered to the jurors in this, that it did not contain the words "according to law" at its conclusion, but only "according to the evidence."

If the contention could for a moment prevail, that the Constitutional provision of 1879, art. 168, made necessary the alteration of the form of a juror's oath, when the brief of counsel asserts that "juries in this State have always been judges of the law as well as the facts," and hence their functions now are just what they have always been, and therefore the oath that was sufficient before must be sufficient now, the objection if good comes too late. It cannot be made in a motion for a new trial, but must be at the time the oath is administered. No objection was made when the oath was first administered, and none when the jurors were re-sworn.

Judgment affirmed.

No. 135.

WM. DAVIS ET AL. VS. JOHN MONTGOMERY ET AL.

When a citizen of Louisiana brings a petitory action against a citizen of Georgia, the latter of whom calls in warranty a citizen of Louisiana, there arise in the case two distinct controversies, one between plaintiff and defendant who are citizens of different States, and the other between defendant and warrantor who are also citizens of different States.

The fact that plaintiff and warrantor are citizens of the same State cannot prevent defendant from removing the cause to a Federal court.

Where at the first term of court after the suit, defendant in his answer files a demand in warranty, the warrantor is entitled to citation and the usual delay for answering, and the cause cannot be tried until after the expiration of that delay. If it does not expire till after the passage of that term, the following term is the first at which the cause could have been tried, and an application for removal made at that term is timely under the provisions of the act of Congress of March 3d, 1875.

APPEAL from the First District Court, Parish of Caddo.
Taylor, J.

J. B. Slattery and *Alexander & Blanchard* for Plaintiffs and Appellants.

Wise & Herndon for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. The suit is a petitory action brought by plaintiffs, residents of this State, against Montgomery, a citizen of Georgia, and his tenants, who are mere nominal parties and need not be further considered, to recover the undivided half of certain immovable property, alleged to belong to plaintiffs but to be in the illegal possession of Montgomery under a title alleged to be void.

The suit went to issue at the March term of the court, when defendant filed his answer denying the alleged title of plaintiffs, asserting the validity of his own title, and at the same time made a demand in warranty calling in A. H. Leonard, a resident of the city of New Orleans, as the author and warrantor of his title, praying that he be cited and for such judgment against him as might be rendered against defendant.

The warrantor was accordingly cited, and the delay allowed him for answering had not passed till after the expiration of the March term of the court.

At the following June term of the court default was taken against the warrantor, and immediately thereafter the defendant, Montgomery, made application for removal of the cause to the Circuit Court of the United States, under the provisions of the act of Congress of March 3d, 1875. All the forms of the law were complied with, but plaintiffs appeared and opposed the granting of the application in an exception based on the ground that the application came too late, because not filed at the first term of the court at which the case could have been tried, as required by the terms of the statute.

The court, after hearing, overruled the exception, and entered judgment removing and transferring the case to the Circuit Court of the United States, from which judgment the present appeal is taken.

Plaintiffs ask a reversal of the judgment of removal on two grounds, viz.:

1. That the application to remove came too late, as set up in the exception.

It is manifest that the defendant had the right to make his demand in warranty; that the warrantor was entitled to be cited, and, in the very words of the Code of Practice, to be "allowed for answering the same delay as in ordinary suits," C. P. 383; and that the cause could not be tried until after the expiration of these delays. Therefore, as these delays had not passed prior to the expiration of the March term of the court, the cause could not have been tried at that term. The first term at which it could have been tried was the following June term, and the application then made was timely under the statute.

2. It is next urged, however, that the order of removal is erroneous, because the controversy in the suit is not "wholly between citizens of different States," as required by statute.

It is true that the warrantor is a citizen of the same State with plaintiffs, but both plaintiffs and warrantor are citizens of a different State from that of defendant.

There is no direct controversy between plaintiffs and warrantor.

Plaintiffs can recover no judgment against warrantor, nor warrantor against plaintiffs. The only judgment which can be rendered in favor of plaintiffs is one against defendant alone. The only judgment which can be rendered against warrantor is one in favor of defendant alone. C. P. 385. Therefore, there are two distinct controversies in the suit, and only two—one between plaintiffs and defendant, who are citizens of different States; the other between defendant and warrantor, who are also citizens of different States.

The expressions in various cases to the effect that the warrantor is the real defendant in the case, that he is entitled to manage the defense not only as between themselves and defendant, but also as between defendant and plaintiff, only mean that as defendant recovers against the warrantor the same judgment which the plaintiffs may recover against the defendant, the warrantor has the right to make such defenses for the former as he shall judge best for his own protection, not against plaintiffs, but against defendant.

The call in warranty is a mere incidental demand, so expressly designated in the Code of Practice.

This action is one which the plaintiffs might have originally brought in the Federal court, and if they had so brought it the citizenship of the warrantor would have been no obstacle to his being called in warranty in that court.

Even after bringing the action the plaintiffs would have had the right to remove it to the Federal court, and defendant could not have deprived them of that right by calling another party in warranty.

If, notwithstanding the call in warranty, the right to remove still subsisted in plaintiffs, it must remain in defendant also, because the statute grants the right indiscriminately to plaintiffs and defendant.

We find no error in the judgment appealed from.

Judgment affirmed.

No. 142.

THE STATE OF LOUISIANA VS. JOE FOSTER.

The fact that one presented as a juror has formed an opinion from rumours of the case and has expressed it, does not disqualify him if he avers that the rumours would not influence him as a juror, and that he will be guided by the evidence in rendering a verdict.

The exercise of a lower judge's discretion in granting or refusing a continuance will not be disturbed, if it has been done soundly and not harshly or arbitrarily.

A prayer or motion for a second continuance for the same cause, for which one has already been granted, is entitled to less favour than the original application.

Conversations with the prisoner touching his identity are admissible to prove that fact, no inducement, threat or promise having been made to him or in his presence.

APPEAL from the Eleventh District Court, Parish of Natchitoches. *Pierson*, J.

D. C. Scarborough, District Attorney, for the State, Appellee.

Ponder & Porter for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The defendant was convicted of rape and was sentenced to be hanged. His appeal presents three objections to the legality of the conviction, embodied in as many bills of exception.

1. J. C. Cammack, a juror, was challenged for cause by the defendant, but the court ruling that the cause was not good, he was challenged peremptorily. The cause of challenge was that the proffered juror had formed and expressed an opinion on the case, based on rumour, and was a man of strong prejudices.

The examination of the juror on *voir dire* was;—"I have read something in the newspapers about this case; have heard the prevailing rumours about it, and have expressed an opinion based upon those rumours. I am a man of strong feelings and prejudices generally. I do not know the prisoner; do not know anything about the case; don't know the witnesses; have no knowledge of the facts; have no bias for or against the prisoner; have no strong feeling against him personally, or his case; believe that I can be guided by the evidence in rendering a verdict, and that I can disregard the impression produced by the rumours. I do not think the rumours I have heard would influence me as a juror."

If the men who disclose that they have strong prejudices as a characteristic are to be excluded from the jury-box, the list of competent jurors will be shortened at the wrong end. He who frankly discloses his own mental peculiarities, but as frankly avows they cannot hinder him from doing his duty, will be a much more impartial weigher of evidence, and is a fitter juror than one who conceals the fact that he

has heard rumours, or is so uncertain of himself that he cannot tell whether the rumours or the newspapers would influence him or not. There is nothing in the answers of the juror that affect his competence, and the prisoner was therefore properly driven to his peremptory challenge.

2. A continuance was refused for the absence of a witnes. The lower judge assigns as reasons for his refusal, that at a previous term the prisoner had obtained a continuance for the absence of several witnesses, and among them this one who was again absent; that no attachment had been asked for the witness, and the particular matter he was expected to prove was an *alibi*, and other witnesses were present to prove the same and had testified relative thereto, and finally the court believed the application was a pretext for delay.

It has been so often said it has become trite, that the trial judge is entrusted with a large discretion in granting or refusing continuances, and it is thoroughly well settled that if his discretion has been soundly exercised, and not harshly or arbitrarily, his ruling will not be disturbed. A request for a second continuance for the same cause as the first continuance was obtained strengthens the supposition that the main object was delay, and the judge no doubt rightfully interpreted the prisoner's motive.

3. The third bill was to the testimony of a deputy-sheriff as to the identity of the prisoner, which was that he had been sent to Shreveport to inspect the prisoners there in jail to ascertain if the accused was among them, and he recognized one of them as the accused. He then detailed his conversation with the prisoner. The objection seems to be to the admission of this conversation in evidence, the bill characterizing it as hearsay.

The proof of identity was made independent of the detailed conversation, but the conversation was admissible for it is not pretended that the prisoner made any confession, and that objection to its admission is made on that score. The sheriff said to the prisoner, "I saw you on such a morning at or near Sinnott's station on the railroad," who replied "no, I came here all the way on the cars." The sheriff rejoined, "I saw on your breast a spot of blood when you passed me on the railroad track," and the accused answered, "oh no, that was red paint I got off the colored quilt we slept under at Alexandria." The sheriff exclaimed, "oh pshaw Jo, you must be the man," and there was no answer.

We are at a loss to perceive why this is inadmissible. What weight it should have—whether any—was matter for the jury, but they were entitled to hear it. Wharton Crim. Ev. 679.

Judgment affirmed.

No. 143.

J. R. HYAMS, ADM'R, vs. E. B. HERNDON ET AL.

The mere relation of attorney and client does not, of itself, disable the attorney of a judgment creditor from buying on his own account at a sale in execution of the judgment, provided he act with perfect fairness and good faith, and in no manner in opposition to the interests of his client.

When the attorney has so acted; when his client, though advised of the sale, has given no authority to buy; when the bid of the attorney was to the advantage of the client, because, but for it, the land would have been sold at a less price; and especially when, as in this case, the client having been offered the option of taking the land or the price, preferred and received the latter, he cannot, long afterwards, be permitted to assail the title of the attorney and demand to be substituted as owner under said title.

APPEAL from the First District Court, Parish of Caddo. *Taylor*, J.

Young & Shepherd for Plaintiff and Appellee.

Alexander & Blanchard for Defendants and Appellants.

The opinion of the Court was delivered by

FENNER, J. The substantial facts in this case are the following:

The succession of H. M. Hyams had a judgment against M. Baer for the sum of $12,000, which recognized a special mortgage and vendor's privilege upon certain lands in Bossier parish. This judgment was rendered in 1876, and in the same year the lands were sold for taxes to one Bodenheimer, whose title was afterwards confirmed by the Auditor.

Subsequently, Isaac S. Hyams, then administrator of the succession of H. M. Hyams, and I. R. Hyams one of the heirs, entered into a written agreement with Nutt and Wise and Herndon, attorneys at law, the substance of which is as follows: After reciting the judgment and tax sale above mentioned, the desire of the heirs to provoke the annulment of said sale and their inability to pay the costs and expense of such a suit, the agreement provides that said attorneys agree to sue for the rescission of the sale and for the enforcement of the judgment on the lands, and furnish the money necessary to pay costs of such proceedings and redeem the lands.

It was further stipulated that, in case they should succeed in annulling the tax sale and in subjecting the lands to sale under the judgment, they were to have for their services "fifty *per centum* of the sum bid at the sale thereof; or if bid in by plaintiffs or for them, then fifty *per centum* of the value of said lands or an undivided half interest therein."

Under this agreement the attorneys proceeded to institute the suit to annul the tax sale, in which they recovered judgment.

Fi. fa. was then issued on the judgment of Hyams vs. Baer, and the lands were seized and advertised for sale.

The evidence shows that the administrator was advised of the progress made; that during the pendency of the advertisement the attorneys made efforts to interest persons in the sale and to get them to attend and bid thereat; that they had no authority from the administrator to bid in the lands for the succession; and that to prevent a sacrifice of the property and for the protection of their own interests, they determined not to permit the land to go for less than two thousand dollars and instructed Col. Snider, of Bossier parish, if it brought a less price, to bid in the land and have it adjudicated to S. B. McCutchen, whom they had selected as their common agent to receive and hold title to the land for them, in order to avoid passing it into the names of a number of persons and to facilitate the transfer in accordance with settlement of interests.

The proceedings attending the sale were all regular, and not a suspicion of fraud is raised as to any of them. Appraisers were appointed, who appraised the land at $1200. There was open competition at the sale, the bids were run up beyond the appraisement and the land was finally bid in by Col. Snider at the price of $1600, and adjudicated to McCutchen according to instructions.

After the sale, the administrator of Hyams was advised of it and of the price at which the land had been adjudicated, and was given the option of taking one undivided half of the land or one-half of the price, whichever he preferred. The administrator replied that he wanted the money and not land. Thereupon the sum of eight hundred dollars was remitted to him by check to his order as administrator, dated April 5, 1881, which was duly paid; and there was an end of the matter until after the death of the then administrator. In September, 1883, the present administrator of Hyams was qualified, and in April, 1884, this suit was filed.

In the meantime, by settlements with Wise & Nutt, the title of the entire land had passed to E. B. Herndon, with the exception of one-sixth which McCutchen had been allowed to retain for a cash consideration.

The gist of the action is, that McCutchen was a merely interposed party and that the attorneys of the succession of Hyams were the real purchasers, which facts are not disputed; that the land sold for less than its value; that it was clearly to the interest of the succession to buy in the land; that, therefore, the bid of the attorneys should be

considered as the bid of the succession and that the resulting title should be considered as the title of the succession; that papers of the succession show no receipt of any portion of the price for which the land was sold; and if any such payment was received, or settlement had, it was made in error as to the value of the land and as to the fact that the attorneys were the real purchasers. The prayer is that, "on final hearing the land named in the petition be decreed to belong to the succession which petitioner represents, and if any settlement with the former administrator be alleged or set up by defendants, that the same be declared null and void, and set aside as made in error and without authority."

The defense rests upon the facts of the case which we have fully stated. We have studied the record with great care and have reflected upon all features of the case without being able to discover any principle from which the plaintiff's case can derive the slightest support.

Much was said in argument, and in the opinion of the judge *a quo*, about the contract between the administrator and the attorneys, which is attacked as illegal and *contra bonos mores* and as a forbidden purchase of a litigious right. But what have we to do with that contract? Who attacks it? What relief is sought against it? The only question in this case is the validity of defendant's title to the land, and whether or not it enures to the benefit of the holders or of the plaintiff succession. This question is wholly independent of the contract under which the suits were prosecuted and depends entirely upon the validity and nature of the title conveyed by the adjudication. If, under the relations of the parties and the facts of the case, defendants had the right to bid and buy at the sale for their own account, their title is valid and cannot be assailed. If, on the contrary, their relations and the facts were such that the bid and purchase could only be made for the benefit of their client, then the plaintiff's case must succeed, unless that benefit has been waived. These questions are entirely independent of the contract for services.

Now, what prevented defendants from bidding and buying at the sale?

It was long since settled in this State that the mere relation of attorney and client does not, of itself, disable the attorney of a judgment creditor from buying for his own account at a sale in execution, provided he act in perfect fairness and good faith, and in no manner in opposition to the interest of his client. Relf vs. Ives, 10 La. 509.

We may certainly say of the defendant in this case, under the statement of facts we have given, what was said of the attorney in the case

just quoted: "Throughout the whole business the defendant appears to us to have acted with strict regard to his professional duties, and with even an anxious solicitude for the interests of plaintiff."

It is said that the land sold for less than its value. Under the evidence here presented, that is probably true. Yet it is to be remembered that most of the lands belong to the class of swamp lands subject to overflows, and that their value is purely speculative, difficult to fix, and fluctuating according to the opinion and views of those who estimate them. Moreover, the land was regularly appraised, advertised and sold at public outcry, with free competition, and no one was found to offer more than the price at which it was adjudicated. Could the title of any competent purchaser be assailed on such a ground?

It is said that it was to the interest of the succession to bid in the land. Suppose it was. Had the attorneys the right to bind the client by such a bid without his authority or instructions? The administrator was advised of the sale by sending him copy of the paper containing the advertisement, and no such instructions or authority were given to the attorney.

It is clear he intended no such authorization, as his subsequent conduct shows.

What harm, then, has befallen the succession? If defendants had not bid, the land must have passed to another purchaser at a less price, whose title would have been unquestionable.

But when we consider that, even after the purchase, the administrator was offered the option of taking half the land or half the price, and accepted the latter, it does seem that all controversy should end. This was a settlement surely within the authority of the administrator, at least so far as the title is concerned. We fail to find any error material to the question. It is said he was not advised as to the fact that the attorneys were the real purchasers. This is itself doubtful; but, if true, it does not seem to affect the case. The only question was, whether he preferred the land or the money. If he should prefer the latter when supposing the land had been bought by Mr. McCutchen, why should he reach a different conclusion if informed that defendants were purchasers.

The next claim is that he was ignorant of the true value of the land. There is nothing to show that his information was not as full as that of defendants. He knew what the land had brought at public outcry. Defendant did nothing to mislead him. He should have made inquiry.

An effort is made to show that, with or without authority, the bid and adjudication to McCutchen was actually made for the account of

all parties to the contract, including the succession for one-half, and that the administrator had certainly no right to divest the succession of this vested property by any extra-judicial settlement.

An attentive study of the evidence convinces us, as it did the district judge, that McCutchen's bid and title were in the interest of defendants only, though they offered plaintiff the option of taking the benefit to extent of one-half, which he declined.

The district judge, while denying the relief specifically sought by plaintiff, found reason to grant a judgment annulling the judicial sale itself and all subsequent transfers. It seems needless to say that, under the prayer of the petition, which, far from attacking, claims the benefit of that sale, and especially in the absence of Baer, the defendant in the judgment executed, this relief is untenable.

We think plaintiff's demand must be rejected.

It is therefore ordered, adjudged and decreed that the judgment appealed from be and is hereby annulled, avoided and reversed; and it is now ordered, adjudged and decreed that there be judgment in favor of defendants and rejecting plaintiff's demand at his cost in both courts.

Judgment reversed.

No. 139.

LAURA A. WALL ET AL. VS. W. B. COLBERT, EXECUTOR.

Mandate or the contract of agency is provable by parol testimony.

Ten years is the prescription period for an action of mandate, or an action to compel an agent to account.

This prescription begins to run when a settlement has been demanded and refused, or in other words when the agency has terminated.

APPEAL from the Second District Court, Parish of Bienville. *Drew*, J.

J. W. Holbert, J. F. Taylor and *Alexander & Blanchard* for Plaintiffs and Appellees.

J. D. & J. T. Watkins for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The defendant is the executor of William S. Parham who died in April 1882. The suit is for the recovery of certain moneys belonging to the plaintiffs, received by Parham as their agent, or for so much thereof as he could not account for.

The plaintiffs owned a plantation that Parham sold for them in 1869 for ten thousand dollars, which he received. He was half-brother to Wall, the deceased husband of the plaintiff Laura. The other plaintiffs are Wall's children. He managed the business of his widowed sister and of her children, and his control of it was as complete and unrestrained as their confidence in him was perfect and unlimited. There can be no question about the facts. The proof of them is abundant. But there is a question whether the evidence exhibiting the facts was admissible.

The defendant interposes as an absolute bar to recovery the prohibition of receiving parol evidence to prove any acknowledgment or promise of a deceased party to pay any debt for the purpose of taking such debt out of prescription. Rev. Civ. Code, art. 2278.

There was no attempt or offer to prove any promise or acknowledgment whatever of Parham to avoid prescription, nor any promise or acknowledgment of his for any other purpose. The parol testimony in question was offered to prove Parham's agency—his receipt of this money and the disposition he made of it—his lending it to others for Mrs. Wall, and his collections of the sums thus lent—and whatever else established his agency.

It is incontrovertible that agency is provable by parol. Brewster v. Saul, 8 La. 297; Laville v. Rightor, 17 La. 310.

During the interval between the receipt of this money by Parham (1869) and the institution of this suit (1882), more than ten years elapsed. The defendant pleads prescription, and since ten years is the prescriptible period for actions such as this, Prudhomme v. Plauché, 27 Ann. 132, the plea would be good if the term began when the money was received. But it is otherwise. Prescription begins when a settlement has been demanded and refused, or at the termination of the agency. Ins. Co. v. Pike, 30 Ann. 488; Idem, 34 Ann. 825.

The only proof of the time when demand was made for the settlement of the agency is the testimony of the plaintiffs, and that fixes it in 1874. It is true Mrs. Wall says the first demand she made of Parham for a settlement was in 1872, and the defendant's counsel insists the first demand fixes the date when prescription begins. But it is apparent from the evidence that whatever date be correct of the demand, the agency did not terminate then. Parham's reply to Mrs. Wall's demand was an exclamation of surprise and an assurance of ultimate satisfaction;—"good God Laura, what are you talking about! You know when I die, you and the children will get it all. What I have got is

yours at my death." And the agency went on. He continued to do with the plaintiffs' business just what he had done before. Receipts signed by him as the agent of Mrs. Wall bear date through the years 1875 and 1876, and the continuance of the agency is therefore shewn up to a time within ten years previous to the institution of this suit.

The court below gave judgment for ten thousand dollars with interest, subject to certain credits that aggregate $6,519.78. An item of $750 among the credits is an error, because it is included in another credit of $1437, and was inadvertently thus twice allowed. The plaintiffs contest other credits, but not to our satisfaction. As well as we can inform ourselves by a transcript that is a mass of confusion and irregularity, the defendant is entitled to all the other credits allowed below.

It is therefore ordered and decreed that the judgment be amended by striking $750 from the list of credits allowed, and that as thus amended that it be affirmed, the defendant paying costs of appeal.